Supreme Court, U.S.
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No. 02-563

In the

# Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

*Petitioners*,

*v.*

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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As an initial matter, petitioners point out some of the misrepresentations in respondents' brief ("OB."):[1]

First, respondents represent that Paul Hill, who killed Dr. Britton, was "closely-tied to petitioners." OB. 2. As the district court instructed the jury (without objection by respodents): "there is *no connection* per se between the killers of—the murders [sic], *Hill*, Salvi, et cetera, and the defendants. They are not in the same organizations and *they are unconnected*." Tr. 768.

Second, respondents represent that "the Nuremberg Files contained Physicians' [i.e., respondents] names, addresses, and family information." OB. 4. The website contains *no* "addresses and family information" for *any* respondent.[2] L.19-20, 26, 37-38.

Third, respondents represent that Judge Kozinski's dissent "acknowledged that the 'majority cite[d] evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat.'" OB. 27. Respondents' cropped quotation is part of a passage in which Judge Kozinski stated the *opposite* of what they represent: "its [the majority's] opinion *fails* to come up with *any proof* that defendants communicated an intent to inflict bodily harm upon plaintiffs." Pet. App. 54a-55a.

And, fourth, respondents claim *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990), found "wanted" posters to be true threats. OB. 12. In truth, the threat resided in the *specific content* of the *mailed* posters, including explicit references to deadly force ("*Execute* Now!" "Must be *Killed*"). *Id.* at 1189, 1193.

Beyond such misrepresentations, respondents' brief concedes each core constitutional fact, while avoiding any significant discussion of the major First Amendment issues presented. Respondents stake their entire position on the argument that this

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[1] Petitioners will be referred to collectively as ACLA. Unless otherwise noted, all emphasis in this brief is added.

[2] The Files contain business information respondent Hern publishes on his website, www.drhern.com. L.26. Respondents also claim that the Files feature "dripping blood," as if to suggest it is the blood of killed or wounded doctors. OB. 3. The animated graphic of dripping blood depicts blood flowing from the tiny limbs of aborted babies. L.15; www.christiangallery.com/atrocity.

case is "factbound," but fail to demonstrate the existence of any *disputed* fact that would impair consideration of the First Amendment question de novo.[3] *E.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-511 (1984). Furthermore, every First Amendment case in which this Court has reversed a jury verdict or bench decision has been "factbound." As this Court has taught, "[T]he reaches of the First Amendment are ultimately defined by the *facts* it is held to embrace, and we must thus *decide for ourselves* whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68 (1995). Under respondents' "factbound" theory, this Court would not have reviewed the "factbound" result in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), which ought to control this case.[4]

***A. Respondents Concede National Importance and Impact.***

Respondents do not dispute any of these points:

First, the majority has converted all posters condemning named abortion doctors into potential RICO and FACE violations, since "wanted-style" is not defined and the majority declares that "differences in caption or words are immaterial." Pet. 9.

Second, the majority's decision permits a speaker's political opponent to define a "threat" merely by professing to be afraid of a speaker's statement in a "context" that includes violent acts of non-parties for which the speaker is not responsible—even if the speaker's statements *are devoid of threatening language*. Pet. 20-21; Life Legal Amicus Br. at 2-13; deParrie Amicus Br. at 2-12.[5]

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[3] The only fact respondents dispute is that the aggregate verdict is $120 million. OB. 5 n.7. It is actually slightly more than that. Pet. App. 46a n.4.

[4] Respondents suggest that this Court not issue a writ because there is no final judgment. OB.6 n.10. This Court may review decisions from federal appellate courts *before* rendition of judgment. 28 U.S.C. § 1254. Further, the First Amendment question is final despite any remand for a pointless recalculation of punitive damages. *See Claiborne*, 458 U.S. at 907 n.42.

[5] In a case where "context" is supposedly crucial, respondents ironically cite a few out-of-context statements from a 3,000 page trial record. OB. 13 n.17. For example, petitioner Bray's remark that a poster made a non-party doctor "bothered and afraid" hardly deprives posters of First Amendment protection.

Third, the majority's attenuated notion of "threat" and its refusal to follow *Claiborne* will be cited in other suits brought to crush political opponents with RICO and FACE claims.[6] Pet. 20.

And, fourth, as the five dissenters warn, the "logic" behind the "poster pattern" theory will be applied to create actionable "patterns" between all manner of facially non-threatening speech and subsequent violence, thus silencing other forms of political expression. Pet. 21; Pet. App. 69a, 102a-103a.

Respondents' concessions only confirm that the majority's decision is "contrary to the *principles* of the First Amendment as explicated...in *Claiborne*...and...*Brandenburg*...." Pet. App. 69a (Kozinski, J., dissenting); S. Ct. R. 10. This is also a case where a circuit court "has decided an important question of federal law that has not been, but should be, settled by this Court"—namely, the appropriate standard for determining the existence of a "threat" in political speech punished under FACE and RICO. S. Ct. R. 10.

### *B. Respondents Concede That The Majority's Decision Rests Entirely On A Fictitious "Poster Pattern."*

Respondents fail to address, and thereby concede, that the majority's "true threat analysis turns on" a non-existent "poster pattern." Pet. App. 39a. Although the majority claimed to have conducted an "independent review" of the record, *id.*, it failed to acknowledge undisputed facts that undercut its entire theory. *Respondents have conceded every one of these undisputed facts*, as to which the jury was not asked to make, and did not make, any finding to the contrary: (1). *Hundreds* of protest posters

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The *Life Advocate* article merely notes (as did the mass media) that Gunn's murder caused other doctors to be afraid. This has nothing to do with posters being "death treats." Regarding the cropped quotation from petitioner Burnett's testimony, in context Burnett testified "I would have to *speculate*" whether publication of personal information about doctors would "*enhance*" their fear of future non-party violence—a mere incitement theory. Tr. 954.

[6] With regard to the non-existent FACE conspiracy claim, respondents state merely that the error is "waived," failing to address the point that subject matter jurisdiction is non-waivable, and that there was no subject matter jurisdiction to try a cause of action that FACE does not contain. OB. 7 n.11; Pet. 26 n.11; *see* Am. Fam. Ass'n Amicus Br. at 2, 13-14.

condemning abortion doctors have circulated for years without subsequent violence. Pet. 8; *see also* deParrie Amicus Br. and Lodging (containing pro-life and political posters); (2). Dr. Patterson was reportedly killed in a *robbery attempt* and there is *no evidence* that his death related to anti-abortion activity. Pet. 8; and (3). the majority's alleged "poster pattern" thus consists of *two* (not three) known acts of anti-abortion violence against doctors named in posters out of *hundreds* of posters circulating. These *undisputed* facts demolish the "poster pattern," without which the only stated basis for affirmance—as unconstitutional as it is—vanishes.

But, *it would not matter even if the poster pattern existed*, since "patterns" cannot extinguish the right to use certain modes of political expression. *This case is not a factual debate over a "poster pattern."*

Further, respondents do not deny that after the "poster pattern" supposedly emerged, the Oregon Court of Appeals ruled that posters condemning named Portland-area abortion doctors, circulated by petitioner AFLM and amicus deParrie, were *not threats* but protected speech. Pet. 16 n.8; deParrie Amicus Br. at 2, 14-16. Hence, ACLA is supposed to have "foreseen" a "threat" where the Oregon Court of Appeals saw only protected speech.

### *C. Respondents Concede That The Majority Sua Sponte Changed The First Amendment Rules After Trial.*

Respondents fail to address, and therefore concede, the following:

Conceded: The majority *sua sponte* created a new, limited theory of liability by which the jury was not bound: that *only* the undefined "wanted-style" *format* of ALCA's posters, not their language, and only the website's "scorecard" of doctors—read in "conjunction with" the poster "format"—were unprotected speech.[7] Pet. 25.

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[7] Respondents claim the majority held ACLA liable not for the "format" of its posters, but for ACLA's "threatening message." OB. 13. The majority contradicts respondents: "[T]he *language* itself is not what is threatening...it is use of the 'wanted'-type *format* in the context of the poster pattern...that constitutes the threat." Pet. App. 39a. Respondents repeatedly refer to ACLA's

Conceded: The district court did not limit the jury to this theory in its instructions. In fact, the theory that only the "wanted-style" format of the posters and the "scorecard" were unprotected *was never raised at any stage of the proceedings below.*[8] Pet. 25.

Conceded: The district court permitted the jury to parse and punish *any aspect* of the posters and website, including their many statements, and petitioners' counsel *urged them to do so.* Pet. 25.

Conceded: A general verdict cannot stand on appeal if one of its possible bases is illegal. *See Griffin v. United States*, 502 U.S. 46 (1991). Pet. 26.

Conceded: The jury was free to punish elements of the communications even the majority declares legally protected, Pet. 23, 25-26; OB. App. 75a-91a, whereas the injunction manifestly punishes speech the majority says is not punishable, including the whole website and the content of the posters or their mysterious "equivalent." Pet. 23, 25-26.

Thus, there is no real dispute that petitioners were tried under one set of First Amendment rules, while the verdict and injunction were affirmed under another.

***D. Respondents Fail To Distinguish Controlling Precedent.***

Concerning the majority's departure from *Brandenburg v. Ohio*, 395 U.S. 444 (1969), respondents miss the point. ACLA was held liable because, according to the majority, the "poster

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"threatening message," but fail to indicate which statements convey the "threatening message." Respondents cannot do so because, as the majority conceded, the *content* of ACLA's posters is protected.

[8] Contrary to respondents' contention, ACLA does not argue that the "poster pattern" theory was first raised on appeal, but rather that liability was first *limited* to that theory on appeal. OB.13 n.18; Pet. 11-12. As respondents now concede, the theories of liability at the trial level merely "included," OB.13 n.18, *but were by no means limited to*, the "poster pattern." At any rate, limitation of liability merely to the *format* of the posters in the "poster pattern" was never raised below, not even as one of several alternative theories. Also, respondents do not deny that non-party Neal Horsley created the so-called "scorecard" in the Nuremberg Files solely on his own, *after* ACLA's name had been removed from his website. Tr. 2251-59. In any case, the "scorecard" is just as protected as ACLA's posters. Pet. App. 69a-70a n.3, 130a n.14.

pattern" "generated fear" of violence and made respondents "seriously worried about being next in line to be shot and killed," Pet. App. 41a, which, of course, never happened. It mattered not to the majority *who* might do violence or *when*, if ever, violence would occur. Pet. 16. Since it is conceded that ACLA did not incite violence, ACLA cannot be held liable for making respondents "worried" about violence in the indefinite future. This is nothing but an unconstitutionally attenuated incitement claim, which the label "threat" cannot conceal.[9]

Respondents wrongly claim that *Claiborne* does not control the outcome of this case. Pet. 16-20. Respondents "distinguish" *Claiborne* on the basis that white merchants, not the blacks whom Evers coerced to observe the boycott, brought the action. OB. 23-26. But *Claiborne* held that the white merchants *could* sue for losses caused directly by violence *and threats of violence* by Evers and the NAACP. 458 U.S. at 916-18. It was precisely because Evers's statements *did not constitute actionable threats against black customers* that this Court struck down the injunction and damage award—after conducting what respondents would contend was inappropriate review of a "factbound" result.

To conclude that *Claiborne* does not control, one would have to reason that Evers's threatening public statements *were not* "true threats" merely because Evers did not name anyone in the small town where he spoke, although boycott-breakers were identified at NAACP meetings and in the "Black Times," whereas petitioners' public statements to a national audience *are* "true threats" merely because petitioners identified respondents (and many others) *without threatening anything*. That conclusion is ludicrous.[10]

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[9] The majority abandoned the key distinction taught in *Brandenburg*, and reinforced in *Claiborne*, between speech that makes people fearful and speech that imminently incites or threatens violence. *Claiborne*, 458 U.S. at 927-98. Respondents essentially concede that this case is not about "threats" but "intimidation," which is a broader concept than "threats." *E.g.*, OB. 4 ("petitioners intended to intimidate"), 7 ("intent to intimidate"), & 17 (same).

[10] Respondents state the *Claiborne* defendants had not actually broken anyone's necks, as Evers had threatened. OB. 24. But petitioners likewise had not committed any violence; this "distinction" only helps petitioners.

Respondents attempt to explain away the conflict between the majority's decision and *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), by noting that *Ashcroft* did not involve threats. OB. 26. Respondents ignore the governing legal principle of *Ashcroft*: that for speech to be punished there must be more than a remote connection between the speech and unlawful acts. 122 S.Ct. at 1403. Ignoring *Ashcroft*, the majority adopted an unheard-of *post hoc ergo propter hoc* theory that a certain "style" of poster "resulted in the death of three doctors." Pet. App. 41a. But there is not even a remote connection between posters and violence.

***E. Respondents Fail To Explain Away Circuit Conflicts.***

Rejecting the de novo review of the three-judge panel, which decided for itself whether the communications were threats, Pet. App. 121a-122a, the majority devised a different review standard for threats cases because, according to the majority, "It is not easy to discern a rule...that can easily be applied in a threats case...." Pet. App. 19a. Respondents *do not deny* that no other circuit has created a special review standard in threats cases. Nor do they deny that the Eighth Circuit has recently conducted de novo review of the core First Amendment question and related facts in an *explicit* threat case, without creating any special standard of review. Pet. 29; *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (en banc). As the majority explained its new standard of First Amendment review, however, "The task in this case does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE." Pet. App. 39a. That is *not* the First Amendment de novo review other circuit courts conduct in obedience to this Court. Pet. 27-30.

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Respondents also claim petitioners were violent because *some* had signed petitions that a non-party's *past* use of force to protect unborn children could be legally justified in criminal proceedings. OB. 25 n.31. The petitions did not call for *future* violence. Even if they did, advocacy of violence as morally justified is protected and cannot convert ACLA's protected posters, which say *nothing* about violence, into unprotected "threats." *Claiborne*, 458 U.S. at 927-28.

Contrary to respondents' suggestion that the dissenters *approved* the majority's standard of review, OB. 27, the dissenters *objected* that the majority had indulged in "broad and uncritical deference to the judgment of a jury." Pet. App. 69a. Such deference avoids the constitutional duty to approach liability for public forum speech with "extreme care." *Claiborne*, 458 U.S. at 926-27. As the dissenters note, "This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse." Pet. App. 58a. Indeed, as we note above, the majority did not even follow its own new standard, under which it professed to accept all undisputed facts as true. Pet. App. 20a, 54a-55a. Had it done so, it would have been forced to acknowledge that the "poster pattern" was a mere invention.

Concerning the Ninth Circuit's conflict with the Second Circuit on what constitutes an actionable threat, *see United States v. Kelner*, 534 F.2d 1020 (2nd Cir. 1976), respondents argue irrelevantly that both circuits consider "context" and apply an "objective" standard of intent. OB. 18-19. The real issue is that the two circuits apply a completely different First Amendment test for the *content* of an actionable threat. Under *Kelner*, ACLA's posters would not be actionable unless "on [their] face and in the circumstances [they are] so unequivocal, *unconditional, immediate and specific* as to the person threatened, as to convey a gravity of purpose and *imminent prospect* of execution." 534 F.2d at 1027. Under the majority's standard, *any statement whatsoever*—even a certain poster "format," exhibiting a certain "style"—can be tried as a threat under FACE, so long as it was "foreseeable" that the political opposition would feel threatened.

### *F. Respondents' Concede That The Injunction Contradicts And Undermines The Very Basis Of The Verdict.*

Respondents speculate that the jury, as well as the judge, found specific intent to "intimidate."[11] OB. 15-16. But the jury was

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[11] Respondents' brief, like the majority opinion, persistently conflates intent to *intimidate* with intent to *threaten* bodily injury. *See, e.g.*, OB. 17. The two are not the same. Respondents never address petitioners' point that FACE requires, not mere intimidation, but intimidation *by* threat of force, and that

*instructed* to impose liability "even if you believe that defendants *did not intend* the statements to be threatening," so long as a "reasonable" speaker would *foresee* that the posters would be "interpreted" as threats—a negligence standard. Pet. App. 251a. Yet, the district court issued a FACE injunction that would punish the communications *only* if they are republished with specific intent to threaten. Pet. App. 181a-184a. Consequently, the injunction *authorizes further threats* under the very "objective" standard respondents defend. *Respondents do not deny this.*

Amazingly enough, respondents even praise the injunction's specific intent standard as a "careful effort[] to tailor the injunction to prohibit no more speech than necessary." OB. 17. Why, then, was the jury not also required to punish "no more speech than necessary"—i.e., only speech specifically intended as a threat? Here, respondents virtually stipulate to a reversal.[12]

None of this is to suggest that the injunction is anything but unconstitutional. Respondents dismiss the applicability of the prior restraint doctrine with a citation to *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). OB. 18. But *Madsen* dealt with conduct, not pure speech in the form of posters. 512 U.S. at 763 n.2. Unlike *Madsen*, the injunction here is expressly content-based. Pet. App. 181a-184a. Further, the injunction's ban on possession of "materials" in petitioners' homes contradicts *Stanley*

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because the district court defined "threat" according to a negligence standard, the FACE "intimidation" instruction hinged on that negligence standard, as Judge Berzon noted. Pet. 21-23; Pet. App. 105a-106a.

[12] Respondents declare that no court of appeals endorses a specific intent standard. OB. 15-16. They fail to mention that *the Ninth Circuit itself* has held that private party claims under federal threat statutes require a showing of specific intent to threaten. Pet. 23 n.9 (citing *Twine* and *Hanna*). Respondents also raise the specter of "clever threateners" evading liability under a specific intent standard, OB. 16; but that standard involves nothing more than proof of mens rea. Besides, respondents *defend* the specific intent standard of the injunction! OB. 17. The real danger posed by this case is that "clever plaintiffs" can use the "reasonable man" standard to convert protected political speech into "threats"—precisely as happened here. *See* Life Legal Amicus Br. at 2-9

*v. Georgia*, 394 U.S. 557, 565 (1969). Pet. 30; Pet. App. 106a-107a n.10. Respondents fail to address this point.

***G. Respondents' Discussion of "Context" is Irrelevant.***

Respondents expend a great portion of their brief discussing the role of "context" evidence in "*true* threat" cases. OB. 8-14. No one disputes that context can help determine whether a given statement—e.g., "You will sleep with the fishes"—is a threat. The problem plaintiffs never address is that in this case (unlike any other) there *was no threatening statement*, but only a "format" and a "style" deemed *threatening* because of an alleged "pattern."

***H. Respondents' Misunderstand the Vagueness Problem.***

Finally, respondents miss the point of ACLA's vagueness argument. OB. 21. It is not FACE, but the majority's forbidden "wanted-style format" and the seemingly eternal "poster pattern" that are vague, leaving anti-abortion speakers to guess whether posters or "equivalent" statements condemning doctors would violate FACE and RICO.[13] The majority's theory renders the statutes unconstitutional *as applied* to "wanted-style posters" or their "equivalent." Pet. 8-9, 14-15; *see also* Am. Fam. Amicus Br. at 4; Life Legal Amicus Br. at 13-19; deParrie Amicus Br. at 9-12.

Thus, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] Amicus Life Legal Defense Foundation rightly asks: "Will the 'poster pattern' ever expire? More importantly, how would a speaker ever know whether it has expired or not?" Life Legal Amicus Br. at 16.